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Criminal Law—Felony Murder Rule—Responsibility for Death of Fellow Arsonist

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opinion recognized the delicacy of the Supreme Court's position, but decided that the circumstances taken as a whole justified reversal.

The foregoing considerations demonstrate the extent to which the instant case exceeds those which preceded it. The question which remains is the outlook for the future. It is submitted that the decision in the instant case represents one further stage in the liberal evolution of the coerced confession rule, finally grounding a decision on totally psychological coercion, and that this doctrine will persist as a basis of condemnation in future involuntary confession cases.

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CRIMINAL LAW—FELONY-MURDER RULE—RESPONSIBILITY FOR DEATH OF FELLOW ARSONIST—Defendant service station lessee hired Donald Freestone to burn his station. Freestone, unknown to defendant, induced Mervin Bishop to help commit the arson. Defendant was not present when the arson was committed. Bishop acted as a look-out while Freestone spread gasoline about the station. The pilot light of a water heater caused the gasoline to explode, and both Freestone and Bishop died as a result of burns received in the explosion. Defendant was convicted of first degree murder for the death of Bishop. On appeal to the Supreme Court of Montana, *held,* affirmed. Any death directly attributable to a plot to commit arson makes all the conspirators equally guilty of first degree murder. *State v. Morran,* 306 P.2d 679 (Mont. 1957) (Justice Davis concurring; Justices Angstman and Anderson dissenting on a question of evidence).

At the common law, a homicide committed while perpetrating a felony was murder,[1] and from an early date Montana has provided a similar rule by statute. The applicable statutes provide that murder is the unlawful killing of a human being with malice aforethought,[2] and that all murder committed in the perpetration or the attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree.[3] When a homicide results unintentionally from the perpetration or the attempt to perpetrate a felony, the malice necessary to make the homicide murder is supplied by the intent to commit the felony, and is transferred by operation of law to the act which caused the death.[4] Thus, any death, though unin-

[1]Mansell and Herbert's Case, 2 Dyer 128b, 73 Eng. Rep. 279 (K.B. 1555).

[2]REVISED CODES OF MONTANA, 1947, § 94-2501 (Hereinafter the REVISED CODES OF MONTANA are cited R.C.M.).

[3]R.C.M. 1947, § 94-2503.

[4]26 AM. JUR., *Homicide* § 39 (1940). An interesting question at this point is the effect of the Montana statutes upon the existence of malice as an ingredient in the felony-murder rule. It could be argued that the requirement of malice is dispensed with through the enumeration in section 94-2503 of the five felonies to which the felony-murder rule applies, or, in other words, that the statute creates a felony-murder rule, limits it to the five named felonies and does away with the traditional position that malice is an essential ingredient in the crime of murder. Another effect of this construction would be that except as provided by the statute there is no felony-murder rule in Montana.

However, section 94-2501 provides that "murder is the unlawful killing of a human being with malice aforethought." This appears to make malice an essential ingredient in all cases of murder. Also, section 94-2503 says "all murder" committed in the course of the named felonies is first degree murder. This appears to

tentional, proximately caused[5] by the commission of one of the felonies enumerated in section 94-2503 is murder, and, by that section, is raised to murder in the first degree.

The questions facing the court in the instant case were: (1) Is the accidental killing of one co-felon by another during the commission of the felony a murder? and, (2) If such killing is murder as to the actor, is it chargeable to a conspirator not present at the commission of the felony?

There is considerable disagreement among the few cases which have considered the liability of a felon for the death of a co-felon occurring during the commission of felony. Where one felon causes his own death, California[6] and New York[7] hold that the co-felon is not liable, while Pennsylvania[8] holds to the contrary. When one of the felons causes the death of a second, California,[9] New York[10] and, by virtue of this case, Montana, hold the other co-felons liable, but Illinois[11] does not. If a felon is killed by someone other than a co-felon, there is again a split. Pennsylvania[12] holds the co-felons liable, while Illinois,[13] and presumably Kentucky,[14] do not.

In deciding the first question the supreme court relied on the California case of *People v. Cabaltero*,[15] which involved the killing of one robber by another during the perpetration of the robbery. All the robbers present and participating in the crime were convicted of first degree murder. This

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presuppose that before the death resulting from the perpetration of these felonies is raised to murder in the first degree it is already murder.

Therefore it would appear that in Montana malice is essential to the existence of murder, even under the statutory felony-murder rule. Section 94-2502, which defines malice, divides it into two types, express and implied. "It is implied . . . when the circumstances attending the killing show an abandoned and malignant heart." It would appear that under this provision the commission of a felony could be considered the manifestation of an abandoned and malignant heart. Under this reasoning Montana criminal law will have a felony-murder rule apart from the felonies enumerated in section 94-2503. If this is determined to be the case, one who causes the death of another in the perpetration of a felony that involves a risk of injury to others, though it is not one of the five named, will be guilty of murder. The degree would be second degree murder, as it would not be encompassed within the statute raising murder in certain instances to murder in the first degree.

The foregoing analysis does not purport to exhaust the subject, but is rather merely to raise the question.

California, under statutes identical to those of Montana, has adopted the above reasoning that the commission of a felony involving a risk to others is a manifestation of an abandoned and malignant heart (People v. Milton, 145 Cal. 169, 78 Pac. 549 (1904)), and that the felony-murder rule exists apart from the statute making homicide caused in the course of certain felonies murder in the first degree (People v. Olson, 80 Cal. 122, 22 Pac. 125 (1889)).

[5]26 AM. JUR., *Homicide* § 190 (1940).

[6]People v. Ferlin, 203 Cal. 587, 265 Pac. 230 (1928).

[7]People v. La Barbera, 159 Misc. 177, 287 N.Y. Supp. 257 (Sup. Ct. Chautauqua Co. 1936).

[8]Commonwealth v. Bolish, 381 Pa. 500, 113 A.2d 464 (1955).

[9]People v. Cabaltero, 31 Cal. App. 2d 52, 87 P.2d 364 (1939).

[10]People v. Udwin, 254 N.Y. 255, 172 N.E. 489 (1930).

[11]People v. Garippo, 292 Ill. 293, 127 N.E. 75, 77 (1920) (dictum).

[12]Commonwealth v. Thomas, 382 Pa. 639, 117 A.2d 204 (1955).

[13]People v. Garippo, 292 Ill. 293, 127 N.E. 75 (1920).

[14]Commonwealth v. Moore, 121 Ky. 97, 88 S.W. 1085 (1905).

[15]31 Cal. App. 2d 52, 87 P.2d 364 (1939).

decision is authority for the proposition that the accidental killing of one felon by another during the perpetration of the felony is murder, and also that the co-felons who are present and participating in the felony are equally responsible.[16]

As to the second question, *i.e.*, whether the murder is chargeable to the actor's conspirator, the problem breaks into two parts, first, whether a conspirator, not present at the commission of the crime, is a principal, and second, whether a principal is responsible for all the acts of his co-felons in executing the felony. The Montana statute[17] provides that a person, not present at the commission of the unlawful act, who has advised and encouraged its commission, is a principal therein, and this state has repeatedly held that a principal in a crime is responsible for the acts of his confederates in executing the felony.[18] Thus, there can be little doubt but that a conspirator, not present at the commission of the felony, is responsible for the acts of his co-conspirators in carrying out the plan, and if the perpetration of that plan results in the killing of any person, except where a co-felon causes his own death, all the conspirators are chargeable with the death.

The court seems to have gone through four steps in arriving at its decision:[19] (1) the principals statute, by which the defendant became a principal in the arson plot; (2) the rule that all principals are responsible for the acts of the other principals in carrying out the conspiracy, by which he became chargeable with the killing; (3) the felony-murder rule, by which the accidental killing became murder; and (4) the statute, by which the murder was raised to murder in the first degree. While it is conceded that the holding follows from the applicable rules of law,[20] it would appear that, in light of the almost grotesque result, at least one of the rules needs to be re-examined. To the writer it is manifestly unjust under a modern system of criminal law that a person who entered into an arson plot to defraud an insurance company, under circumstances which did not appear to create any substantial risk to human life, should be punished as severely for the accidental death of a person involved in the plot as he would have been had he wilfully and deliberately entered into a plot to kill the person.

[16]The *Cabaltero* case, as pointed out, is authority only for the proposition that the co-felons who are present and participating are responsible. It in no way supports the rule that a co-conspirator who is absent at the time of the commission of the felony will be responsible. The case contains no language to that effect. In fact, an interesting point about this case is that one conspirator, who was not present at the commission of the crime, was acquitted of the murder even though he was convicted of the robbery. The position of this person is on all fours with that of the defendant in the present case. However, the propriety of his acquittal by the jury was not before the appellate court and no mention was made of it in the opinion. Thus the case, in this respect, lends no support for the defendant in the present case.

[17]R.C.M. 1947, § 94-204.

[18]State v. Miller, 91 Mont. 596, 9 P.2d 474 (1932); State v. Reagin, 64 Mont. 481, 210 Pac. 86 (1922).

[19]This is conjecture by the writer since the court did not explain the reasoning used in arriving at its decision.

[20]Although the following comment is purely conjectural, it would appear that a different result could have been reached. This would come about if the court would say, in effect, "Granted that taken by itself each of the enumerated rules is firmly established and sound. However, when the four rules must be aggregated to reach a result, and their interplay will lead to an injustice, such a result will not be allowed."

Of the four rules relied upon by the supreme court, the statute raising murder committed during the perpetration of one of the enumerated felonies to murder in the first degree appears to be the one which should be re-examined. The basis of our penal system is that the punishment should be commensurate with the degree of culpability of the accused.[21] One exception to this basic doctrine is the statutory first degree felony-murder rule. To establish first degree murder in any other instance, it is necessary to prove that the accused deliberately, wilfully, and with premeditation, murdered the deceased.[22] The common law felony-murder rule says, in effect, that the intent to commit a felony dangerous to human life shows a malicious state of mind, and this state of mind was present when the homicide was committed. Therefore the homicide is murder. Then, having established that the homicide is murder, section 94-2503 makes it murder in the first degree.

A change in this statute making wilfulness, deliberation, and premeditation requisites of first degree murder in all cases would appear to be a desirable reform in our criminal law. Proof that a homicide was committed during the perpetration, or attempt to perpetrate, a dangerous felony would still establish malice and justify a conviction for second degree murder.[23] If the state should seek a first degree conviction it would have the burden of showing that the accused determined to kill if necessary to carry out the plot, or to prevent someone from interferring with its perpetration or his escape. While such a change would place an additional burden on the state in seeking a first degree conviction in felony-murder cases, the burden would be no greater than in other instances where it seeks such a conviction. In the light of the unjust results which can flow from the application of the present statute, as in the case at hand, the burden does not appear to be unreasonable.[24]

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[21]See R.M. 1947, §§ 94-2501, 2503, 2505, 2507, 2508, 2511, 2513, 2515. Note, however, MONT. CONST. art. III, § 24.

[22]R.C.M. 1947, § 94-2503.

[23]Note, 66 YALE L.J. 427 (1957).

[24]It would also be possible to avoid an injustice such as that of the present case through an intermediate approach that does not go the extent of requiring premeditation and deliberation in all cases of first degree murder. This approach would require that in order for the felon to be guilty of first degree murder the state must prove that under the circumstances the felony contemplated was forseeably dangerous to life. If this were the rule, the defendant in the present case would not be guilty of first degree murder, while a conspirator in a plot to burn down an occupied apartment house would. Such an approach could be required by the legislature, or could be made by the court under the existing first degree murder statute. That is, the court, in construing the statute, could imply the above requirement on the ground that such construction would effectuate the purpose for which it was enacted.